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OPINION
OF
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Opinion No. 87-73

By: Michael J. Vargon
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To: Frank Ready, Director
Education Retirement Board
P.O. Box 1029
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QUESTION:

Does active duty as a uniformed commissioned officer in the United States Public Health Service qualify as military service pursuant to Section 22-11-34(A)(3) NMSA 1978?

CONCLUSION:

See analysis.

ANALYSIS:

The Educational Retirement Act, Sections 22-11-1 through 22-11-45 NMSA 1978, establishes a retirement and disability system for persons who are employed in various state educational institutions and related organizations. Members of the system may acquire "allowed service credit" pursuant to Section 22-11-34. "Allowed service credit" is defined as "that period of time during which a member has performed certain nonservice-employment with which he may be accredited, as provided in the Educational Retirement Act, for the purpose of computing retirement or disability benefits[.]" Section 22-11-2(L).

A member who acquires allowed service credit will increase his retirement benefits as provided by the formula established in Section 22-11-30. Section 22-11-34(A)(3) provides, in part: "A

member shall be certified to have acquired allowed service-credit for those periods of time when he was ... engaged in United States military service from which he was honorably discharged...." Thus, to be eligible to acquire allowed service credit pursuant to this section, a member must fulfill two requirements: 1) he must have engaged in "military service"; and 2) he must have been honorably discharged from such service.

The Surgeon General administers the United States Public Health Service ("P.H.S.") under the supervision and direction of the Secretary of Health and Human Services. 42 U.S.C. §202. P.H.S. maintains a Regular Corps and a Reserve Corps, both of which consist of commissioned officers. 42 U.S.C. §204. Commissioned officers are part of the "uniformed services." See 10 U.S.C. §§101(43), 1072(1).

A Regular Corps or Reserve Corps commissioned officer while on active duty is exempt from registration, training, and service under the Military Selective Service Act, 50 U.S.C. App. §§451-473, when he has been assigned to staff the various offices and bureaus of the P.H.S.; assigned to the Coast Guard, Bureau of Prisons, Department of Justice, Environmental Protection Agency, or Environmental Science Services Administration; or assigned to assist Indian tribes, groups, bands or communities pursuant to 42 U.S.C. §§2001 - 2005f, 50 U.S.C. App. §456(a)(2). A commissioned officer who has served on active duty for a period of two years or more is exempt from all requirements of the Military Selective Service Act except in times of war or national emergency. 50 U.S.C. App. §456(b)(3)(c)(i). P.H.S.-commissioned officers are entitled to wear uniforms, 42 U.S.C. §216(a), and receive ranks equivalent to military ranks, 42 U.S.C. §207. They also have been granted a number of other military benefits. See, e.g., 42 U.S.C. §§213, 213a.

While P.H.S.-commissioned officers enjoy many of the military's attributes and benefits, traditionally they have not been considered to be a part of the United States military forces. The United States Attorney General, in 30 Ops. Att'y. Gen. 56 (1921), concluded that P.H.S. personnel were not part of the military or naval forces of the United States as that term was used in Section 1 of the Revenue Act of 1918, 40 Stat. 1058. The Attorney General noted that P.H.S. personnel were not subject to military law or courts-martial, and that they did not perform duties of a military nature. See also Waller v. United States, 180 F.2d 194 (D.C. Cir. 1950) (holding that service in the P.H.S.-commissioned corps during the period 1914-1940 did not qualify as service in the armed forces for purposes of income tax exemption).

The status of the P.H.S. Commissioned Corps has changed since 1921. The president may declare the Commissioned Corps to be a

military service in time of war or emergency involving national defense. 42 U.S.C. §217. The President issued such a declaration in Exec. Order No. 9,575, 10 Fed.Reg. 7895 (1945) (effective July 29, 1945). Further executive orders extended the declaration until July 3, 1952. See Exec. Order No. 10349, 17 Fed. Reg. 3769 (1952); Exec. Order No. 10356, 17 Fed. Reg. 4967 (1952); Exec. Order No. 10362, 17 Fed. Reg. 5413 (1952); Exec. Order No. 10367, 17 Fed. Reg. 5929 (1952). Thus, for the period from July 29, 1945, through July 3, 1952, the Commissioned Corps was a military service.

Section 215 of chapter 42 of the United States Code authorizes the Secretary of Health and Human Services to detail P.H.S. officers and employees to other departments. When officers are detailed for duty with the Army, Air Force, Navy, or Coast Guard, they are subject to the laws governing the service to which they are detailed. 42 U.S.C. §215(a). P.H.S.-commissioned officers on active service who are detailed for duty with the Army, Navy, Air Force, Marine Corps, or Coast Guard, or on active service while P.H.S. is part of the United States military forces pursuant to 42 U.S.C. §217, are entitled to all rights, privileges, immunities, and benefits accorded to commissioned officers of the Army, except "retired pay" and uniform allowances. 42 U.S.C. §213(a). Other P.H.S.-commissioned officers enjoy some, but not all, of the benefits. 42 U.S.C. §§213(d), 213(e), 213a.

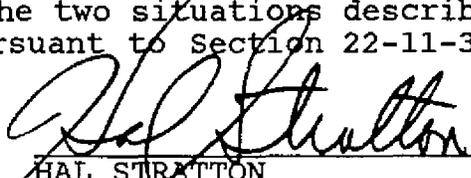
In summary, the P.H.S. Commissioned Corps is a uniformed service that has many attributes of military service. In some situations, when the President issues a declaration pursuant to 42 U.S.C. §217, the Commissioned Corps is considered to be a military service for all purposes. Even in situations where the entire corps is not declared to be a military service, individual officers who are detailed to the armed services, *i.e.*, the Army, Navy, Air Force, Marine Corps and Coast Guard, are subject to all laws governing the armed services.

The issue is whether service in the P.H.S.-commissioned corps qualifies as "military service" as Section 22-11-34(A)(3) uses that term. In construing a statute where there is no clearly expressed legislative intent requiring otherwise, words are to be given their ordinary and usual meaning. Tafoya v. New Mexico State Police Bd., 81 N.M. 710, 714, 472 P.2d 973, 977 (1970). "Military" is defined as "pertaining to war or to the army; concerned with war. Also the whole of military forces, staff, etc. under the Department of Defense." Black's Law Dictionary 895 (5th ed. 1979). Using this definition, we conclude that active duty as a uniformed commissioned officer in the United States Public Health Service qualifies as "military service" pursuant to Section 22-11-34(A)(3) in the following situations:

1. When the Commissioned Corps has been declared to be a military service pursuant to 42 U.S.C. §217. At present, this period would include from July 29, 1945, to July 3, 1952.

2. During any time that a commissioned officer has been detailed to a branch of the armed services, as 10 U.S.C. §101(4) defines that term. This presently consists of the Army, Navy, Air Force, Marine Corps, and Coast Guard.

Therefore, duty as an active duty, uniformed commissioned officer in the P.H.S. in one of the two situations described above qualifies as military service pursuant to Section 22-11-34(A)(3).



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